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SJC-13203

COMMONWEALTH vs. ELIZABETH GEBO.

Hampden. January 5, 2022. - June 2, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Assault and Battery by Means of a Dangerous Weapon.

Constitutional Law, Waiver of constitutional rights, Trial by jury, Trial jury-waived. Waiver. Practice, Criminal, Trial jury-waived, Waiver of trial by jury.

Complaint received and sworn to in the Springfield Division of the District Court Department on July 26, 2017.

The case was tried before William P. Hadley, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Chrisoula I. Roumeliotis for the defendant.

John A. Wendel, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights guarantee a criminal defendant the right to a trial by

jury. In a noncapital case, a defendant may waive this constitutional right, so long as jurors have yet to be empanelled. See G. L. c. 263, § 6. Where a defendant requests a waiver, trial will proceed jury-waived "[i]f the court consents," id.; a "judge may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record," Mass. R. Crim. P. 19 (a), 378 Mass. 888 (1979).

We have yet to clarify the appropriate standard of review of a judge's denial of a motion for jury waiver. Nor have we explained the contours of "good and sufficient reason," within the meaning of Mass. R. Crim. P. 19 (a), for a judge to deny the waiver. Judges presented with motions for jury waiver therefore have had little guidance in addressing a defendant's request for a waiver.

The defendant in this case sought to waive her right to a jury trial on the day of trial, after previously having elected a jury trial at a trial readiness conference twelve days earlier. The judge denied the request for a waiver, reasoning that the request gave "the appearance or the inkling of judge shopping." The defendant challenges this denial and maintains that she was not "judge shopping." The defendant also challenges her conviction of assault and battery by means of a dangerous weapon on a person aged sixty or older, on the ground

that the evidence at trial was insufficient to prove beyond a reasonable doubt that the chair the defendant used to strike the victim was a dangerous weapon within the meaning of G. L. c. 265, § 15A (a).

We conclude that the appropriate standard of review of a judge's decision on a request for a jury waiver is an abuse of discretion. Here, there was no abuse of discretion in the judge's determination to deny the request on the ground that it gave the appearance of "judge shopping." We conclude as well that the evidence was sufficient to support the single conviction of assault and battery by means of a dangerous weapon, because the evidence would have allowed the jury to find, beyond a reasonable doubt, that the chair, as used, was a dangerous weapon.

1. Background. The jury could have found the following. At the time of the altercation that led to the defendant's conviction, in April of 2017, the victim and the defendant had been married for fifty-five years. The victim, who was seventy-six years old at the time of trial, was in the family home, watching television and drinking coffee, when his wife walked through the kitchen and out into the breezeway. He heard a loud noise, and when he went out to investigate, found that his wife had thrown one of his shoes onto the deck. An argument ensued, which the victim characterized as the defendant "hollering" at

him. The argument involved the cleanliness of the deck and the shoe, which the defendant maintained smelled of dog feces. As the victim bent down to pick up his shoe, the defendant grabbed a plastic chair and swung it at him, hitting him near the left wrist. When the victim again bent to pick up the shoe, the defendant again swung the chair, but the victim was able to grab it and push it away from himself.

The victim returned to the house, and the defendant followed him into the kitchen, where she picked up a ladle and hit him in the back of the head. The victim briefly lost consciousness and awoke on the kitchen floor. The defendant told him that he had had a heart attack. The victim was treated at a hospital emergency room for a one inch by two and one-half inch gash on his wrist, and an injury to the back of his head that required staples to close. Because the victim was taking anticoagulants, both injuries bled profusely, but the victim was able to be released after the injuries were treated.

The defendant testified in her own defense that she had walked into the breezeway, smelled a foul odor coming from the victim's shoe, and threw it onto the deck. The victim then ran toward her with his arms raised, and she picked up a deck chair to protect herself. The victim wrestled the chair out of her hands, cutting her arm in the process. The victim returned to the house, and the defendant went to the kitchen to treat her

arm. At that moment, she heard a sound and saw the victim on the floor, with a cut on his head. The victim called 911 and was taken to the hospital, where he was treated and released.

The defendant was charged with two counts of assault and battery by means of a dangerous weapon (a chair and a blunt object) on a person aged sixty or older, in violation of G. L. c. 265, § 15A (a), and one count of violating an abuse prevention order, in violation of G. L. c. 209A, § 7.<sup>1</sup>

On January 17, 2018, a hearing judge held a trial readiness conference to assess whether the case would proceed to trial. When the judge asked, "This is going to be a jury trial?" defense counsel responded, "As of this point, yes, Your Honor." The judge replied, "Okay. Be subject to a motion when it's called for trial next week or in the future." The case was scheduled for trial on January 29, 2018.

On January 29, 2018, the day of trial, the parties appeared before the trial judge, a different judge from the one who had presided over the readiness conference. The defendant completed the form titled "Motion Pursuant to Rule 19 (a) for Relief from Election of Jury or Jury-Waived Trial" and requested a jury-waived trial. The form required the defendant to select the

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<sup>1</sup> On the first day of trial, before the jury were empanelled, the Commonwealth entered a nolle prosequi on the charge of violating an abuse prevention order.

reasons for her request from a list of options.<sup>2</sup> The defendant selected the option, "Specific characteristics of this case have caused me to reconsider my original election (Specify below)," but did not specify anything further in the allotted space on the form.

In open court, the trial judge discussed the defendant's motion with defense counsel:

The judge: "Okay, and [the defendant] elected a jury trial previously?"

Defense counsel: "She had previously, Judge."

The judge: "So what's the basis for waiving that at this point?"

Defense counsel: "Judge, we have consulted extensively today about the different options, and I understand we did not elect a jury waived trial on the 15th, or when is it the trial I guess."

The judge: "Uh huh."

Defense counsel: "We did have high hopes coming into today, given my client's lack of criminal history . . . that the case be resolved. I did speak with my client today again about what the different options were. I think given the facts of this case, given the time, context of this case, a jury waived trial is appropriate. I did go over the difference with my client and she believed given

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<sup>2</sup> The waiver form enumerates the following options:

(1) "I/my attorney have recently become aware of additional evidence that could not have been discovered earlier and that bears on my decision whether to proceed with a trial by jury or a bench trial (Specify below)"; (2) "Specific characteristics of this case have caused me to reconsider my original election (Specify below)"; (3) "Specific characteristics about myself, as the Defendant, have caused me to reconsider my original election (Specify below)"; (4) "I have retained new counsel"; and (5) "Other (Specify below)."

all the circumstances that she wanted a jury waived trial today."

The judge: "Okay, well that really isn't a legitimate reason. I mean it's a legitimate reason as far as you're concerned, but lawfully under the current rules in Massachusetts there has to be a good cause and that does not amount to good cause."

Defense counsel: "I can only tell the court that I have attempted or on other occasions I have gone down to courtroom nine or courtroom [ten] and have been able to elect a jury waiving of trial, given different circumstances so --"

The judge: "Okay."

Defense counsel: "With that understanding --"

The judge: "Well, good for you."

Defense counsel: "Yeah."

The judge: "My ruling is that's, that's not good cause under the standards for waiving a once elected jury trial. So that motion is denied. We have jurors and we will use them."

Defense counsel: "Judge, I would just say the Commonwealth does not object to a jury waived trial."

The judge: "I don't care. All right. I have to apply the law equally and that is not good cause. So the parties want a trial, you get a trial. It's going to be a trial in front of the jury. That is what was elected and to waive that on the day of trial, part of the issue and I don't think it's me, but the issue of avoiding the appearance or the inkling of judge shopping, et cetera --"

Defense counsel: "And, and there's no judge shopping here --"

The judge: "It's done, it's done. I'll note your objection. I'll note the Commonwealth's objection if you want to, but we have jurors here today, it's a jury trial."

The members of the venire then were called in, and the Commonwealth moved for trial. Defense counsel requested a sidebar conference, at which he told the judge that the "onus is actually on the Court" and "not defense counsel." The judge reiterated his denial of the request for jury waiver. Empanelment proceeded, and trial ensued. Both the victim and the defendant testified as the only witnesses. The jury found the defendant guilty of assault and battery by means of a dangerous weapon, a chair, on a person aged sixty or older; the defendant was acquitted of the second count, involving the ladle. On the defendant's appeal, the Appeals Court concluded that the judge erred in denying the defendant's request for a jury-waived trial, and we granted the Commonwealth's petition for further appellate review.

2. Statute and court rules governing jury waiver. A criminal defendant's request for waiver of the constitutional right to a jury trial is governed by G. L. c. 263, § 6, and the Massachusetts Rules of Criminal Procedure. See Mass. R. Crim. P. 11 (b) (2) (iii), as appearing in 442 Mass. 1509 (2004); Mass. R. Crim. P. 19 (a). The District Court and Municipal Court Rules of Criminal Procedure also regulate the request for a jury waiver. See Dist./Mun. Cts. R. Crim. P. 4(e).

The basic framework for requesting a jury waiver is set forth in G. L. c. 263, § 6, which provides, in relevant part,



"Any defendant in a criminal case other than a capital case . . . may, if he [or she] shall so elect, when called upon to plead, or later and before a jury has been impanelled . . . , waive his [or her] right to trial by jury by signing a written waiver thereof and filing the same with the clerk of the court. If the court consents to the waiver, [the defendant] shall be tried by the court instead of by a jury, but not, however, unless all the defendants, if there are two or more charged with related offenses, . . . shall have exercised such election before a jury has been impanelled to try any of the defendants . . . . Except where there is more than one defendant involved as aforesaid, consent to said waiver shall not be denied in the district court or the Boston municipal court if the waiver is filed before the case is transferred for jury trial to the appropriate jury session, as provided in [G. L. c. 218, § 27A]."

The rules of criminal procedure similarly provide that a defendant may waive the right to a jury and that a judge may refuse to allow such a waiver, but contain much more specificity than does G. L. c. 263, § 6. Rule 19 (a) of the Rules of Criminal Procedure provides,

"Where the defendant has the right to be tried by a jury, the defendant may waive the right to be tried by a jury, provided that the judge determines after a colloquy that such waiver is knowing and voluntary, and the defendant signs a written waiver, which shall be filed with the court. . . . The judge may refuse to approve such a waiver for any good and sufficient reason provided that such refusal is given in open court and on the record."

Other rules requires a defendant to make an initial election before the day of trial. For instance, pursuant to Mass. R. Crim. P. 11 (b) (2) (iii), once a judge has determined that "the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has

been accomplished," "the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date."

The District and Municipal Court Rules of Criminal Procedure also set requirements beyond the provisions of G. L. c. 263, § 6. Rule 4(e) of the District/Municipal Courts Rules of Criminal Procedure states,

"When the pretrial conference report is submitted, the court shall examine it for completeness, shall rule on any disputed discovery issues, and, unless discovery compliance is still pending, shall inquire if the defendant waives the right to jury trial.

"The court shall not compel the defendant's decision on waiver of jury trial until all discovery issues have been resolved and compliance with any discovery orders has been completed. Compliance with discovery orders may require the scheduling of a 'compliance/election hearing' as provided in Rule 5. However, the defendant may proceed to enter the decision on jury waiver and a trial date may be set prior to compliance with discovery orders, at the defendant's option."

In addition, Rule 10(b) of the District/Municipal Courts Supplemental Rules of Criminal Procedure provides,

"In the primary court the defendant shall decide whether or not he or she will waive the right to jury trial after completion of the pretrial conference and the hearing on the pretrial conference report, and after completion of the guilty plea or admission of procedure, if any . . . . In the jury session, the defendant shall decide whether or not he or she will waive the right to jury trial no later than the commencement of trial. The defendant shall not be required to decide on waiver of the right to jury trial in either the primary court or jury session until disposition or withdrawal of any pretrial discovery motion filed in accordance with the Massachusetts Rules of Criminal

Procedure and compliance with any court order issued in conjunction therewith."

3. Discussion. The defendant argues that the trial judge erred in denying her motion to waive her right to a jury trial, after previously having elected a jury trial at the trial readiness conference. The defendant contends that, because G. L. c. 263, § 6, allows her to request a jury trial before jury empanelment and jurors had not yet been empanelled, the judge lacked "good and sufficient reason," Mass. R. Crim. P. 19 (a), to deny her request. The defendant maintains that the judge's reasoning concerning the appearance of judge shopping was faulty because, by her request for a waiver, she was not attempting to steer the case away from a jury and toward the assigned judge. In addition, the defendant argues that the evidence was insufficient to support a finding beyond a reasonable doubt that the chair was a dangerous weapon within the meaning of G. L. c. 265, § 15A (a).

a. Denial of request for jury waiver. While a criminal defendant has a constitutional right to a jury trial, see Commonwealth v. Dietrich, 381 Mass. 458, 460 (1980), "neither the Federal nor the State Constitution provides the right to waive a jury trial,"<sup>3</sup> Commonwealth v. Francis, 450 Mass. 132, 134

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<sup>3</sup> By contrast, the constitutions of some States, including New York and Oregon, provide that a criminal defendant may waive

(2007), S.C., 477 Mass. 582 (2017). Trial by jury is the "normal . . . and preferable mode of disposing of issues of fact in criminal cases" (citation omitted). Singer v. United States, 380 U.S. 24, 35 (1965). See Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) (there is "great public interest in jury trials as the preferred mode of fact-finding in criminal cases").

While G. L. c. 263, § 6, affords defendants the right to seek a waiver, it provides no certainty that a request for a waiver will be allowed. We review a question of statutory interpretation de novo. Commonwealth v. Montarvo, 486 Mass. 535, 536 (2020). "Our analysis begins with the plain language of the statute, which is the principal source of insight into legislative intent" (quotation and citation omitted). Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712 (2018).

After stating that a criminal defendant may waive the right to be tried by a jury, G. L. c. 263, § 6, provides that only "[i]f the court consents" shall a defendant "be tried by the court instead of by a jury" (emphasis added). A defendant may waive this right "provided that a judge determines after a colloquy that such waiver is knowing and voluntary." Mass. R. Crim. P. 19 (a). We previously have determined "that G. L. c. 263, § 6, and rule 19 (a) merely prescribe procedures to be

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the right to a jury trial. See People v. Duchin, 12 N.Y.2d 351, 352-353 (1963); State v. Harrell, 353 Or. 247, 252 (2013).

followed if a defendant or a codefendant wishes to waive the right to a jury trial," and do not "vest any personal right in criminal defendants," nor do they "limit the court's power to hear the case." See Commonwealth v. Collado, 426 Mass. 675, 678 (1998). Thus, the plain statutory language alone does not explain when a judge may withhold consent, i.e., may deny a request for a jury waiver. See 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) ("Where we are unable to ascertain the intent of the Legislature from the words of a statute, we look to external sources, including the legislative history of the statute, its development, its progression through the Legislature, prior legislation on the same subject, and the history of the times").

Examination of the legislative history of G. L. c. 263, § 6, is illuminating on the question of a judge's authority to deny a request for a jury waiver. See Montarvo, 486 Mass. at 536, quoting Commonwealth v. Garvey, 477 Mass. 59, 61 (2017) (words of statute may be clarified by construing them "in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished" [quotation and citation omitted]). The requirement in G. L. c. 263, § 6, that a court must approve a request for a jury waiver was added in 1979, see St. 1979, c. 344, § 19, following a fifty-year period in which criminal

defendants in noncapital cases had an unqualified right to waive a jury trial. See Collado, 426 Mass. at 677-678 (discussing how St. 1929, c. 185, § 1, amended G. L. c. 263, § 6, to include provisions for jury waivers, which previously had been deemed beyond courts' jurisdiction).

In 1979, the rules of criminal procedure were substantially revised; Mass. R. Crim. P. 19 (a) was modified to incorporate the portion of Fed. R. Crim. P. 23(a) that provides that the waiver of a jury trial must be approved by the court. See Reporters' Notes to Rule 19, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure (LexisNexis 2021). In parallel, G. L. c. 263, § 6, was amended to reflect the addition of the requirement for court approval in Mass. R. Crim. P. 19 (a). See Commonwealth v. Greene, 400 Mass. 144, 147 (1987) (discussing how Mass. R. Crim. P. 19 [a] "essentially mirrors" G. L. c. 263, § 6). The emergency preamble to St. 1979, c. 344, states that "one purpose of the legislation [was] to have its provisions in effect on the same date as the Massachusetts Rules of Criminal Procedure." Id. Thus, we construe the statute in harmony with the 1979 amendment to Mass. R. Crim. P. 19 (a), providing that a "judge may refuse to approve [a jury] waiver for any good and sufficient reason"; this language remains in place today. See Commonwealth v. Wright, 479 Mass. 124, 133 (2018) (rules of

procedure are construed under same canons as rules of statutory interpretation, beginning with plain language of rule).

Because a decision on a request for a jury waiver is within the discretion of the judge, see Commonwealth v. Kope, 30 Mass. App. Ct. 944, 946 (1991), we review a decision denying such a request for an abuse of discretion, see Boulter-Hedley v. Boulter, 429 Mass. 808, 809-811 (1999) (statute was construed to grant judge discretionary authority, and therefore judge's ruling was reviewed for abuse of discretion). Unlike a reviewing court, a presiding judge is able to observe a defendant and his or her attorney firsthand and therefore is in the best position to determine whether a jury waiver is sought to obtain some unfair advantage. See Commonwealth v. Lao, 443 Mass. 770, 776-777 (2005), S.C., 450 Mass. 215 (2007) and 460 Mass. 12 (2011); State v. Dunne, 124 N.J. 303, 317 (1991).<sup>4</sup>

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<sup>4</sup> Courts in other jurisdictions generally have concluded that the appropriate standard of review for a judge's denial of a request for jury waiver is abuse of discretion. See, e.g., Deshields v. State, 706 A.2d 502, 509 (Del. 1998); State v. Bleyl, 435 A.2d 1349, 1366-1367 (Me. 1981); State v. Jones, 270 Md. 388, 393-394 (1973); State v. Linder, 304 N.W.2d 902, 904-905 (Minn. 1981); State v. Richardson, 313 S.W.3d 696, 700 (Mo. Ct. App. 2010); Commonwealth v. Garrison, 242 Pa. Super. 509, 515 (1976). By contrast, the Court of Appeals of Wisconsin appears to review the scope of a judge's authority to deny a jury waiver de novo. See State v. Burks, 2004 WI App 14, ¶ 9.

Federal courts similarly have adopted an abuse of discretion standard of review for a judge's denial of a jury waiver. See, e.g., United States v. Johnson, 841 F.3d 299, 302 (5th Cir. 2016) ("We adopt the abuse of discretion standard in

Although a judge possesses broad discretion to deny a defendant's motion for a jury waiver, the denial of a request for such a waiver cannot stand where "the judge made a 'clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014). In adopting the 1979 changes to the rules of criminal procedure, the Legislature sought to uphold the fair and efficient administration of the Commonwealth's courts. See Greene, 400 Mass. at 148. See also Mass. R. Crim. P. 2 (a), 378 Mass. 844 (1979) (rules of criminal procedure "shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of expense and delay"). Accordingly, it would be absurd to construe G. L. c. 263, § 6, to empower a judge with unfettered discretion to deny a defendant's request for a jury waiver. See Wallace W. v. Commonwealth, 482 Mass. 789, 793 (2019) ("we are careful to avoid any construction of statutory language which leads to an absurd result" [quotation and citation omitted]). Rather, a judge may deny a defendant's request for a jury waiver if, in

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our examination of the district court's denial of a written waiver of a jury trial that has been approved by both the defendants and the Government").



the circumstances of the case, doing so would serve the fair and efficient administration of justice.

With respect to the fair administration of justice, a range of circumstances might lead a judge to conclude that a particular case should be tried by a jury. For instance, the judge might be aware of certain pretrial matters that "would unfairly prejudice, at least in appearance, the rights of the defendant." See, e.g., Commonwealth v. Collins, 11 Mass. App. Ct. 126, 141 (1981). Alternatively, resolution of a case might require the consideration of complex factual questions or numerous credibility determinations, such that a judge reasonably could conclude that they were "best left to a jury of twelve." See, e.g., United States v. Clapps, 732 F.2d 1148, 1151 (3d Cir.), cert. denied, 469 U.S. 1085 (1984), abrogated on other grounds by McNally v. United States, 483 U.S. 350 (1987). See also Blakely v. Washington, 542 U.S. 296, 313 (2004) ("Our Constitution and the common-law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury"). As discussed infra, there also may be circumstances where a defendant is, or appears to be, using a jury waiver to steer a case away from a jury and toward a particular judge, a practice that could incite public cynicism as to the fair administration of justice. See, e.g., Commonwealth v. Wallace,

522 Pa. 297, 312 (1989) (defendant's right to waive jury trial "is not absolute and it does not include the right to judge-shop").<sup>5</sup>

As to judicial economy, a judge "may grant [a motion for waiver] at any time and should do so whenever it will promote the fair, reasonable, and efficient administration of justice." State v. Godfrey, 182 Neb. 451, 458, cert. denied, 392 U.S. 937 (1968). To ensure efficient proceedings, our rules of criminal procedure and District and Municipal Court rules require a defendant to make an initial election of trial by jury or a jury-waived trial at a pretrial conference or a compliance

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<sup>5</sup> Although there is no constitutional right to a jury-waived trial, see Commonwealth v. Francis, 450 Mass. 132, 134 (2007), S.C., 477 Mass. 582 (2017), the denial of a request for a jury waiver is not a trivial matter for a defendant, see Ciummei v. Commonwealth, 378 Mass. 504, 508 n.7 (1979) (jury waiver is "decision regarding trial strategy"). A trial by jury is the preferred mode of adjudicating factual disputes, but a defendant may be entitled to a jury-waived trial in the rare case where "passion, prejudice . . . public feeling or some other factor" render an impartial trial by jury "impossible or unlikely" (quotation, citation, and footnote omitted). See Singer v. United States, 380 U.S. 24, 37-38 (1965). See also United States v. United States Dist. Court for the E. Dist. of Cal., 464 F.3d 1065, 1070 (9th Cir. 2006), cert. denied, 551 U.S. 1133 (2007) ("The Supreme Court has never determined whether the circumstances alluded to in Singer actually existed -- i.e., where requiring a defendant to undergo trial by jury would infringe his [or her] constitutional right to a fair trial -- nor has it ever decided what circumstances would create such an unusual situation"); Polk v. State, 567 A.2d 1290, 1295 (Del. 1989) ("In Singer, the United States Supreme Court implied that where the denial of a bench trial would interfere with the defendant's right to a fair trial, waiver should be permitted").

hearing, once the pretrial conference report and discovery are complete. See Mass. R. Crim. P. 11 (b) (2) (iii); Dist./Mun. Cts. R. Crim. P. 4(e). See also Commonwealth v. Durning, 406 Mass. 485, 495 (1990), quoting Mass. R. Crim. P. 11 (purpose of pretrial conference is to promote "fair and expeditious disposition of the case"). This procedure comports with G. L. c. 263, § 6, because a defendant who initially elects a jury trial nonetheless may submit a request for a jury-waived trial before jury empanelment. See Police Dep't of Salem v. Sullivan, 460 Mass. 637, 641 n.7 (2011) (statute supersedes court rule where they are in "irreconcilable conflict"). "[N]othing in the rule prevents a defendant who elects a jury trial from waiving the right at a later date." Reporters' Notes (Revised, 2004) to Rule 11, Mass. Ann. Laws Court Rules, Rules of Criminal Procedure (LexisNexis 2021).

Here, the judge denied the defendant's request for a jury waiver based on concerns that the defendant's request gave "the appearance or the inkling of judge shopping." "Judge shopping" refers to a litigant's attempt to steer a case toward or away from a particular judge, generally out of some belief that the judge's idiosyncrasies would make it more or less beneficial to the litigant that that particular judge preside over the litigation. See, e.g., Commonwealth v. Pagan, 445 Mass. 315, 321 (2005); Demoulas v. Demoulas, 432 Mass. 43, 53 (2000). The

practice is inherently unfair to other litigants, undermines public confidence in the judiciary, and properly has earned the condemnation of courts across the country. See United States v. Mavroules, 798 F. Supp. 61, 68 (D. Mass. 1992) ("the appearance of judge-shopping where there is no basis for recusal is itself antithetical to the interests of justice"); Municipal Publs., Inc. v. Court of Common Pleas of Philadelphia County, 507 Pa. 194, 202 (1985) ("Judge shopping has been universally condemned, and will not be tolerated at any stage of the proceedings"); Norwood, Shopping for a Venue: The Need for More Limits on Choice, 50 U. Miami L. Rev. 267, 299 (1996) ("Courts consistently treat judge shopping as an impermissible form of shopping for justice"). See, e.g., United States v. El-Gabrownny, 844 F. Supp. 955, 958-959 (S.D.N.Y. 1994); In re Anwiler, 958 F.2d 925, 930 (9th Cir.), cert. denied, 506 U.S. 882 (1992); Matter of Mason, 916 F.2d 384, 386 (7th Cir. 1990); Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1, 839 F.2d 1296, 1302 (8th Cir.), cert. denied, 488 U.S. 869 (1988). Because it affords an unfair advantage to defendants with better access to highly experienced attorneys, who may possess unique insights into particular judges, judge shopping also disturbs equity among defendants at large. "No defendant, indeed, no person, has a vested interest in having a

particular judge assigned to his [or her] case." Commonwealth v. O'Brien, 432 Mass. 578, 584 (2000).

One version of judge shopping in criminal cases involves a defendant's use of a request for a jury waiver to secure a jury-waived trial after the identity of the trial judge has become known. In 2011, this court, led by then Chief Justice Roderick L. Ireland, commissioned a special counsel investigation into cases involving charges of operating a motor vehicle while under the influence of drugs and alcohol (OUI), in order to examine potential disparities in acquittal rates in jury-waived trials and jury trials. See R.J. Cinquegrana, Report to the Supreme Judicial Court 1 (Oct. 2012). See also Bombardieri & Saltzman, SJC Seeks to Halt 'Judge Shopping' in OUI Cases, Boston Globe, Nov. 1, 2012. The special counsel found that "[w]hen the cases were resolved in a jury trial, 58% of the defendants were acquitted. When judges considered the merits of OUI cases in bench trials, 86% were acquitted." Cinquegrana, supra at 6. In addition, the special counsel observed,

"[I]t appears that judges rarely reject proffered waivers in OUI cases. More importantly, judges generally permit waivers to be filed on the day of trial, even after there has been a colloquy between the court and counsel indicating which judge is available to try the case. We heard several reports that defense lawyers may indicate, in that setting, that the defendant would waive a jury in one session but not another. Faced with pressure to dispose of cases in a busy court, judges may acquiesce and assign the case to a session where the case will be resolved in a jury-waived trial much more quickly than in a jury trial.

Thus, judges who are perceived to be more favorable to the defendant end up handling more bench trials, and in turn some of those judges establish a record which perpetuates this selection process."

Id. at 45.

Although the investigation specifically focused on cases involving charges of OUI, the special counsel noted that "it is difficult to see how a rule change could be effected for only one category of offenses." Id. The report suggested that "the interests of justice and perception of fairness would be served by changes to the practice of allowing a defendant's decision as to jury waiver to be postponed until the eve of trial."

Statement of the Justices of the Supreme Judicial Court 6  
(Nov. 1, 2012).

In response to the special counsel investigation, this court convened a joint working group to further examine the issue and revert with recommendations. Id. The working group proposed that, in order to limit the use of jury waivers for judge shopping, a trial judge

"who is asked to approve a waiver of trial by jury under Mass. R. Crim. P. 19 (a) or to grant relief from a waiver, must consider all relevant factors including, in particular, whether the request is (1) timely, (2) based on a specific characteristic of the case or of the defendant, and (3) consistent with the need to maintain efficient caseload management."

Supreme Judicial Court Working Group Regarding Procedures for  
the Waiver of Trial by Jury in the Boston Municipal Court and

District Court Departments: Report and Recommendations 32

(Mar. 28, 2013). The working group also highlighted potential inefficiencies associated with the use of jury waiver to judge-shop, noting that a defendant "[w]aiting to request relief from an election for trial by jury . . . until the date of the trial when it would have been reasonable to make the request earlier may . . . diminish juror utilization and public support for jury service."<sup>6</sup> Id. at 33.

The defendant maintains that even if judge shopping is a valid basis for the denial of a defendant's request for a jury waiver, there was no indication here that the defendant in fact was judge shopping. Specifically, the defendant points to language in G. L. c. 263, § 6, that permits a defendant to request a jury waiver on the day of trial, prior to jury empanelment.

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<sup>6</sup> To implement these recommendations, the working group prepared a draft "Motion Pursuant to Rule 19 (a) for Relief from Election of Jury or Jury-Waived Trial" form. The form asks a defendant who seeks a jury-waived trial, after previously electing a jury trial and after the case had been assigned to a jury session, to specify his or her reasons for requesting jury waiver. Supreme Judicial Court Working Group Regarding Procedures for the Waiver of Trial by Jury in the Boston Municipal Court and District Court Departments: Report and Recommendations (Mar. 28, 2013) (Appendix C). In 2015, the Chief Justice of the District Court Department promulgated the form for use in the District Court. Memorandum on New Recommendations Regarding Jury Waiver and Promulgation of Newly Amended Criminal Pretrial Conference Report Form 5 (Jan. 8, 2015).

While we agree that the mere fact that a defendant seeks to waive his or her right to a jury trial on the day of trial cannot render the request for a jury-waived trial invalid per se, G. L. c. 263, § 6, does not circumscribe a judge's discretion to deny a request for a jury waiver where there are objective circumstances, apart from the timing of a defendant's request, that suggest the defendant is or may be judge shopping. Here, there were sufficient circumstances, based in the record and independent of the timing of the request, that tended to support the trial judge's concerns.

Here, at the trial readiness conference in the District Court, pending discovery issues were resolved, and the judge then obtained the defendant's initial election as to whether the case was to be tried by a jury or to proceed jury-waived. See Dist./Mun. Cts. R. Crim. P. 4(e). As stated, the defendant elected a jury trial. On the day of trial, when the identity of the trial judge became known to the defendant, she filed a motion for relief from her prior election. On the motion form requesting a change to a jury-waived trial, the defendant selected from a list of options, "Specific characteristics of this case have caused me to reconsider my original election (Specify below)"; she did not provide additional information in the allotted space on the form. This change in election apparently concerned the trial judge, who asked the defendant to



clarify why she sought a jury-waived trial at that time, after previously having elected to proceed to a trial with a jury. The defendant replied, "[G]iven the facts of this case, given the time, context of this case, a jury waived trial is appropriate."

The judge initially commented that this explanation was not consistent with the procedural requirements.<sup>7</sup> The explanation also evidently was unconvincing to the judge, who had had the benefit of examining the demeanor of the defendant's attorney as he spoke. See Commonwealth v. Mercado, 456 Mass. 198, 210 (2010) (trial judge is in "best position" to observe demeanor of attorneys). The judge then observed that the defendant's request gave "the appearance or the inkling" of judge shopping. Given the circumstances before him, we cannot say that the judge's concern was so unreasonable as to constitute a "clear error of judgment" (citation omitted). See L.L., 470 Mass. at 185 n.27. Therefore, the judge did not abuse his discretion in denying the defendant's request for a jury-waived trial.

Although we conclude that there was no abuse of discretion in the decision to deny the request for a jury-waived trial, we

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<sup>7</sup> Although the judge first stated, incorrectly, that the defendant was required to show "good cause" in order to waive her right to a jury trial, the judge subsequently amended his rationale for the denial when he expressed his concerns as to the appearance of judge-shopping.

acknowledge the benefits to a defendant and the court of accepting a request for a jury waiver. For a defendant, whether to waive the right to a jury trial is an important "decision regarding trial strategy." See Ciummei v. Commonwealth, 378 Mass. 504, 508 n.7 (1979). Presumably, a defendant requests a jury waiver after having concluded that he or she would fare better before a judge than before a jury. See Dietrich, 381 Mass. at 461-462. As for the court, it is clear that a jury-waived trial typically is more efficient than a jury trial, because it eliminates the expense of empanelling jurors and spares the trial judge the time that otherwise would be spent facilitating a protracted jury trial. Given these benefits, our decision today should not be construed as a general critique of any request by a defendant to waive his or her right to a jury trial. A criminal defendant in a noncapital case is free to request a jury waiver in accordance with G. L. c. 263, § 6, and the rules of criminal procedure, after having elected a jury trial, but he or she should do so with the understanding that the statute allows a judge to deny such a request if it would undermine the fair and efficient administration of justice.

b. Sufficiency of the evidence. The defendant also argues that the evidence introduced at trial was insufficient to establish beyond a reasonable doubt that the chair was a "dangerous weapon" within the meaning of G. L. c. 265, § 15A.

We review the evidence at trial in the "light most favorable to the Commonwealth," asking whether "[a]ny rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Commonwealth v. Latimore, 378 Mass. 671, 676-677 (1979), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).

"The criminal law of assault and battery by means of a dangerous weapon expresses society's desire to punish the use of an instrument which is capable of producing serious bodily harm." Commonwealth v. Appleby, 380 Mass. 296, 306-307 (1980). Dangerous weapons are defined as either being dangerous per se, that is, "designed and constructed to produce death or great bodily harm" and "for the purpose of bodily assault or defense," or being dangerous as used. Commonwealth v. Wynton W., 459 Mass. 745, 749 (2011), quoting Appleby, supra at 303. An object may be dangerous as used even if ordinarily it is innocuous. See Appleby, supra at 304, and cases cited. See also Wynton W., supra at 754 n.5 (noting that "household items" can be used as dangerous weapons); Commonwealth v. Tevlin, 433 Mass. 305, 312 (2001) ("sneakers may be determined to be a dangerous weapon"). This broad construction promotes the "policy of [G. L. c. 265, § 15A,] to deter the use of 'neutral' objects in a dangerous fashion." Appleby, supra at 308.

Here, the victim testified that the defendant picked up a plastic chair and swung it at the victim's left arm. The chair was swung with enough force to pierce the victim's skin and to leave an abrasion approximately one inch wide and two and one-half inches long that bled profusely and required treatment at a hospital emergency room. See United States v. Johnson, 324 F.2d 264, 265-266 (4th Cir. 1963) (plastic and metal chair was dangerous weapon when swung at victim's head and caused laceration around eye).

To the extent that the victim's bleeding was worsened by the fact that he was taking anticoagulants, that does not detract from the manner in which the defendant used the chair. See Tevlin, 433 Mass. at 313, quoting Commonwealth v. Starling, 382 Mass. 423, 429 (1981) ("In a criminal case 'the wrongdoer takes the victim as he or she finds him'"). In addition, the victim stated that, after the initial blow, the defendant made another attempt to hit the victim with the chair. Ordinarily, a chair is an innocuous object. Here, however, the jury permissibly could have credited the victim's testimony describing how the defendant used the chair to strike him and to cause a serious injury to his wrist. See Appleby, 380 Mass. at 307 n.5 ("the question whether a weapon is dangerous as used is always one for the fact finder"). Reviewing the evidence in the light most favorable to the Commonwealth, the jury

reasonably could have concluded that the chair, as used, satisfied the requirement to be a dangerous weapon within the meaning of G. L. c. 265, § 15A.

Judgment affirmed.